In the Supreme Court of the United States

OCTOBER TERM, 1942

NO. —— ORIGINAL

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA FOR A WRIT OF PROHIBITION AND/OR MANDAMUS AGAINST THE HONORABLE FRANCIS G. CAFFEY, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, AND THE OTHER JUDGES AND OFFICERS OF SAID COURT, AND FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION OR WRIT OF MANDAMUS, OR BOTH, TOGETHER WITH A PRAYER FOR A WRIT OF CERTIORARI

Now comes the Solicitor General on behalf of the United States of America and moves:

1. For leave to file the petition for a writ of prohibition or mandamus, or both, hereto annexed, under Sections 234 and 262 of the Judicial Code (28 U. S. C. secs. 342, 377);

2. That said petition, which includes an appropriate prayer therefor, be considered also as a petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, under Sec-

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tion 262 or 240 (a) of the Judicial Code (28 U. S. C. sec. 377); and

3. That a rule be entered and issued directing the District Court of the United States for the Southern District of New York and the Honorable Francis G. Caffey, a judge thereof, and the other judges and officers of said court, to show cause why such writs should not issue, in accordance with the prayer of said petition, and why the United States of America should not have such other and further relief therein as may be just.

The petition for a writ of prohibition or mandamus, or both, referred to in paragraph 1, *supra*, appears to be the proper mode of challenging the jurisdiction of a district court when proceeding in admiralty, *Ex parte Republic of Peru*, No. 13, Original, 1942 Term, particularly where, as here, application for the writ was made to the circuit court of appeals, which declined to entertain the application. *Ex parte Muir*, 254 U. S. 522, 530; (see *Muir* v. *Chatfield*, 255 Fed. 24 (C. C. A. 2d)); cf. *Ex parte Kawato*, 317 U. S. 69, 71. The authority conferred on this Court by Section 234 of the Judicial Code to issue writs of prohibition to district courts in admiralty is itself a grant of appellate jurisdiction and hence does not involve the question whether the writ is "necessary for" the exercise of appellate jurisdiction other-

wise conferred, within the meaning of Section 262 of the Judicial Code.

The petition for a writ of certiorari, referred to in paragraph 2, *supra,* is added in the event that this Court should wish to consider separately the question of the jurisdiction of the circuit court of appeals to grant prohibition or mandamus, or both, in the circumstances here presented. The granting of certiorari under Section 262 of the Judicial Code where the circuit court of appeals has declined to permit a case to be docketed, deeming itself to be without jurisdiction, appears to be sanctioned by *In re 620 Church Street Corporation,* 299 U. S. 24; *Holiday* v. *Johnston,* 313 U. S. 342; and *Steffler* v. *United States,* No. 14, Original, 1942 Term. If necessary, however, it is requested that the petition be treated as one for certiorari under Section 240 (a) of the Judicial Code, to review a judgment of the circuit court of appeals. Cf. *Ex parte Quirin,* 317 U. S. 1, 24 (appeal from district court's denial of leave to file).

CHARLES FAHY,
Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

In the Supreme Court of the United States

OCTOBER TERM 1942

NO.——, ORIGINAL

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA FOR A WRIT OF PROHIBITION AND/OR MANDAMUS AGAINST THE HONORABLE FRANCIS G. CAFFEY, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, AND THE OTHER JUDGES AND OFFICERS OF SAID COURT AND FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR A WRIT OF PROHIBITION OR WRIT OF MANDAMUS, OR BOTH, TOGETHER WITH A PRAYER FOR A WRIT OF CERTIORARI

The petition of the United States of America for a writ of prohibition or a writ of mandamus or both, against the Honorable Francis G. Caffey, Judge of the District Court of the United States for the Southern District of New York and against the other judges and officers of said court, and for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, respectfully shows:

I. On April 15, 1942, there was filed in the United States District Court for the Southern District of New York sitting in admiralty by AGWILINES, INC., a Maine corporation, a certain libel in a cause of collision, civil and maritime, entitled "AGWILINES, INC., as owner of the Steamship *Brazos* and as bailee of the cargo laden therein, against THE UNITED STATES OF AMERICA" docketed In Admiralty No. 124-337 (R. 2-3, 7-9).[1] Process in the usual form was issued and served on the United States (R. 2-3).

II. Said libel alleged ownership by libellant of the Steamship *Brazos;* that the *Brazos* had on January 13, 1942, been in collision with a certain motor vessel, formerly named *Moremacland,* caused solely by the fault and negligence of said motor vessel and those in charge of her; and that as a result of the collision libellant had sustained damages including loss of the Steamship *Brazos* and her cargo and personal effects of those on board her and other expenses in the sum of $850,000. The libel alleged ownership by the United States of the said motor vessel, and that at the time of the collision it was a public vessel of the United States; and it invoked the jurisdiction of the United States District Court under the Public Vessels Act of March 3, 1925, c. 428, 43 Stat.

[1] References are to the printed certified transcript of proceedings in the district court and the circuit court of appeals, in lieu of exhibits to this petition.

1112 (46 U. S. C. 781–790), and prayed recovery of damages from the United States (R. 7–9).

III. Thereafter, and in proper time, the United States of America, respondent in said cause, appearing specially, excepted to said libel for want of jurisdiction of the District Court and filed exceptive allegations (R. 10–12).

IV. Said exceptive allegations showed that the vessel referred to as formerly named *Moremacland* was not a merchant vessel nor a tugboat; and that she was a vessel of war, renamed H. M. S. *Archer*, in the possession and under the exclusive command and control of the British Government, and commissioned, officered, manned, supplied, and operated by that Government. The exceptive allegations showed that the H. M. S. *Archer* had this status at the time of the collision and ever since November 17, 1941, when the United States, being the owner of the *Moremacland*, delivered the vessel to Their Lords Commissioners of the Admiralty, on behalf of His Britannic Majesty, pursuant to the provisions of the Lend-Lease Act of March 11, 1941, c. 11, 55 Stat. 31 (22 U. S. C., Supp. I, Secs. 411–422). (R. 10–11.)

V. Said exceptive allegations concluded that by reason of the matters therein shown, H. M. S. *Archer* being a vessel of war and not having been employed as a merchant vessel and not being a tugboat, and being a public vessel of the United Kingdom rather than a public vessel of the United

States, the proceeding in the District Court is outside the scope of the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525 (46 U. S. C. Secs. 741–752) and of the Public Vessels Act of March 3, 1925, c. 428, 43 Stat. 1112 (46 U. S. C. Secs. 781–790); is a suit against the United States without its consent; and is outside the jurisdiction of the District Court (R. 12).

VI. Following the filing of said exceptive allegations by the United States, certain parties, being OLAVARRIA & Co., INC., and others, as intervening-petitioners obtained leave of the District Court to intervene as owners of the cargo laden on the *Brazos* and filed a petition substantially copying the allegations of the libel and praying recovery of damages from the United States for the alleged injury to said cargo in the sum of $142,000 (R. 4, 12–16).

VII. The United States consented to the said intervention without prejudice to its exceptive allegations, and it was agreed by the intervening-petitioners that the exceptive allegations be considered as applying to the intervening-petition as well as to the libel (R. 4).

VIII. The facts alleged in said exceptive allegations were accepted as true, and not disputed by either the libellant or the intervening-petitioners. Instead, the libellant brought on said exceptive allegations for argument, and moved the District Court for an order to strike out said exceptive allegations, and the intervening-peti-

tioners joined in said motion. (R. 16.) The motion was argued before Honorable Francis G. Caffey, United States District Judge, on February 2, 1943. On March 12, 1943, District Judge Caffey filed an opinion, wherein for reasons stated, he announced that the motion would be granted (R. 16–27). In said opinion he held that the H. M. S. *Archer* was a "public vessel of the United States" within the meaning of that phrase in the Public Vessels Act, and that the District Court had jurisdiction of the cause. Thereupon, the said court assumed jurisdiction of the cause and will proceed to hear and determine the merits thereof.

IX. Thereafter, by order dated April 3, 1943, the motion of the libellant and intervening-petitioners for an order striking out the exceptive allegations was granted in all respects; and it was ordered that the exceptive allegations were dismissed, and that the United States appear and answer the libel and the intervening petition (R. 28).

X. As appears from the foregoing, the undisputed facts set forth in the exceptive allegations, stricken and dismissed by the District Court, showed that the sole relationship of the United States to the matter sued on is that, being the owner of the *Moremacland,* the United States delivered the vessel as lend-lease aid to the British Government, who in turn commissioned her in

the British Navy as a vessel of war, renamed H. M. S. *Archer,* and who operated her in that status at the time of the collision.

XI. Petitioner submits that by reason of the matters set forth in the exceptive allegations above referred to, the District Court was and is without jurisdiction to proceed to hear and determine the matters alleged in the libel and intervening petition; that the District Court erred in striking and dismissing the exceptive allegations which showed its lack of jurisdiction; and that the District Court erred in holding that on the facts presented by said exceptive allegations the H. M. S. *Archer* was a "public vessel of the United States" within the meaning of that phrase in the Public Vessels Act which consents to suit against the United States "for damages caused by a public vessel of the United States."

XII. The order made by District Judge Caffey dated April 3, 1942, is not an appealable order, and the question of the jurisdiction of the District Court over said cause can be presented on appeal only after answer and trial on the merits and a resulting decree determining the rights and liabilities of the parties. The availability of such an appeal ultimately is an inadequate remedy, since the United States would be put to the burden of an elaborate investigation and trial and since the facts, evidence, and witnesses to the issues on the merits are in the control of the

British Navy. The difficulties thus presented, together with the importance of not diverting naval personnel from combat functions during this time of war, will render the Government's preparation and defense on the merits wholly inadequate.

XIII. Petitioner further submits that the question presented of the jurisdiction of the District Court in these circumstances is a question of large importance warranting prompt and authoritative determination. Numerous vessels have been delivered to our allies as lend-lease aid. Should the District Court's decision be upheld ultimately, further legislation or international arrangements may prove desirable in order to protect the interests of the United States. Such treatment would be premature pending authoritative determination of the question now presented.

XIV. In view of the foregoing, petitioner prepared and on April 28, 1943, presented to the United States Circuit Court of Appeals for the Second Circuit a motion for leave to file a petition for a writ of prohibition or a writ of mandamous, or both, against the Honorable Francis G. Caffey, Judge of the District Court of the United States for the Southern District of New York, and the other judges and officers of said court. The petition annexed to said motion prayed for a writ of prohibition prohibiting further proceedings in said cause in the district court and for a writ of mandamus directing the vacat-

ing of the order of April 3, 1943, and the entry of an order dismissing the cause for want of jurisdiction (R. 2–6).

XV. Jurisdiction of the Circuit Court of Appeals was invoked under Section 262 of the Judicial Code (28 U. S. C. Sec. 377) empowering said court to issue all writs necessary to the exercise of its jurisdiction. That court would have appellate jurisdiction on appeal from any final decree in the cause or from any interlocutory decree determining the rights and liabilities of the parties, under Sections 128 and 129 of the Judicial Code (28 U. S. C., Secs. 225, 227), and the jurisdiction of said court to issue a writ of prohibition or a writ of mandamus, or both, in aid of its appellate jurisdiction was invoked by said petition.

XVI. Upon the presentation of said motion and petition to the Circuit Court of Appeals on April 28, 1943, before the Honorable Thomas W. Swan, Circuit Judge, sitting to hear *ex parte* applications pursuant to the rules of said court, he signed an order dated April 28, 1943, directing the United States District Court for the Southern District of New York, and the Honorable Francis G. Caffey and the other judges and officers of said district court to show cause before the Circuit Court of Appeals on May 3, 1943, why the motion of the United States for leave to file its petition should not be granted. Said order to show cause also directed the attention of counsel to the ques-

tion whether the Circuit Court of Appeals had jurisdiction of the proceeding sought to be instituted by the filing of said petition. The order to show cause cited *Muir* v. *Chatfield,* 255 Fed. 24 and *Ex Parte Republic of Peru,* United States Supreme Court, October Term 1942, No. 13 Original, decided April 5, 1943, and directed that the argument on the return to the order to show cause be confined to the question of the jurisdiction of the Circuit Court of Appeals (R. 1).

XVII. Said order to show cause together with said motion and petition were duly served on April 28, 1943, by leaving a copy of the order, motion, and petition with the Clerk of the United States District Court for the Southern District of New York. The same were likewise served the same day by leaving copies with the proctors for the libellant in the district court and with the proctors for the intervening petitioners in the district court.

XVIII. On May 3, 1943, the matter came on to be heard before the Circuit Court of Appeals, Circuit Judges Swan, Clark, and Frank sitting. At the close of the argument on behalf of the motion, the court announced that it had decided to deny the motion for want of jurisdiction of the Circuit Court of Appeals. Thereafter the Circuit Court of Appeals, by an order made and entered dated May 3, 1943, denied the motion for want of jurisdiction of that court. (R. 29.)

XIX. The jurisdiction of this Court under sections 234 and 262 of the Judicial Code to issue a writ of prohibition or a writ of mandamus, or both, to the United States District Court for the Southern District of New York is hereby invoked. Viewed as a petition for writs of prohibition and mandamus, the question presented by this petition is: Whether, notwithstanding exclusive possession, operation and control of H. M. S. *Archer* by the British Navy, the lend-lease arrangements with respect to that vessel rendered her a "public vessel of the United States" within the scope of the Public Vessels Act.

XX. There is likewise hereby invoked the jurisdiction of this Court, under Sections 262 and 240 (a) of the Judicial Code, to review by writ of certiorari the decision of the United States Circuit Court of Appeals for the Second Circuit. To accompany this petition, treating it as a petition for a writ of certiorari to the Circuit Court of Appeals, there is being filed herewith a certified copy of the record in the Circuit Court of Appeals. Viewed as a petition for a writ of certiorari an additional, and preliminary, question presented is: Whether the circuit court of appeals had jurisdiction under Section 262 of the Judicial Code to issue writs of prohibition and mandamus to the district court to prohibit proceedings in that court in excess of its jurisdiction. In holding in the negative, the circuit court of appeals followed its

own prior decision to that effect in *Muir* v. *Chatfield*, 255 Fed. 24, and declined to follow the dictum of this Court to the contrary, and the apparent assumption in each of the opinions, in *Ex Parte Republic of Peru*, October Term 1942, No. 13 Original, decided April 5, 1942. Apart from the merits of the application for the writ, the question of the jurisdiction of the Circuit Court of Appeals to entertain the proceeding for the writ is a question of general importance that should be authoritatively settled by this Court.

WHEREFORE the United States of America, the aid of this honorable Court respectfully requesting, prays:

1. That a writ of prohibition may issue out of this honorable Court to the said Honorable Francis G. Caffey, Judge of the United States District Court for the Southern District of New York, and the other judges and officers of said court, prohibiting him and them from taking any steps whatsoever in the cause aforesaid, other than to dismiss the same for want of jurisdiction, and generally from the further exercise of jurisdiction in said cause, or the enforcing of any order, judgment, or decree made under color thereof.

2. That a writ of mandamus may issue out of this honorable court, directing and commanding the Honorable Francis G. Caffey, Judge of the United States District Court for the Southern District of New York, or such other of the judges

of the said court as may be assigned to the matter, to vacate the order of April 3, 1943, so entered by him, striking and dismissing the exceptive allegations of the United States and directing the United States to answer the libel and intervening petition, and further to enter an order in said cause dismissing the libel and the intervening petition for want of jurisdiction.

3. That the court grant to the United States of America such other and further relief as may be just in the premises, including a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review its order of May 3, 1943, denying the motion of the United States of America for leave to file its petition in that court for a writ of prohibition and/or a writ of mandamus.

CHARLES FAHY,
Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Francis M. Shea, being first duly sworn, deposes and says: I am the Assistant Attorney General in charge of the Claims Division of the Department of Justice and as such have charge on behalf of the United States of the admiralty litigation to which it is a party. I have read

the foregoing petition and know the contents thereof, and am familiar with the proceedings in the United States District Court for the Southern District of New York and in the Circuit Court of Appeals for the Second Circuit to which reference is made in said petition. The statements of fact contained in the foregoing petition are true to the best of my knowledge, information, and belief.

FRANCIS M. SHEA,
Assistant Attorney General.

Sworn to before me this 31st day of May 1943.

[NOTARIAL SEAL] MARY G. KITE,
Notary Public, District of Columbia.

U. S. GOVERNMENT PRINTING OFFICE: 1943

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. —

THE UNITED STATES OF AMERICA, PETITIONER

VS.

THE HONORABLE FRANCIS G. CAFFEY, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, AND THE OTHER JUDGES AND OFFICERS OF SAID COURT

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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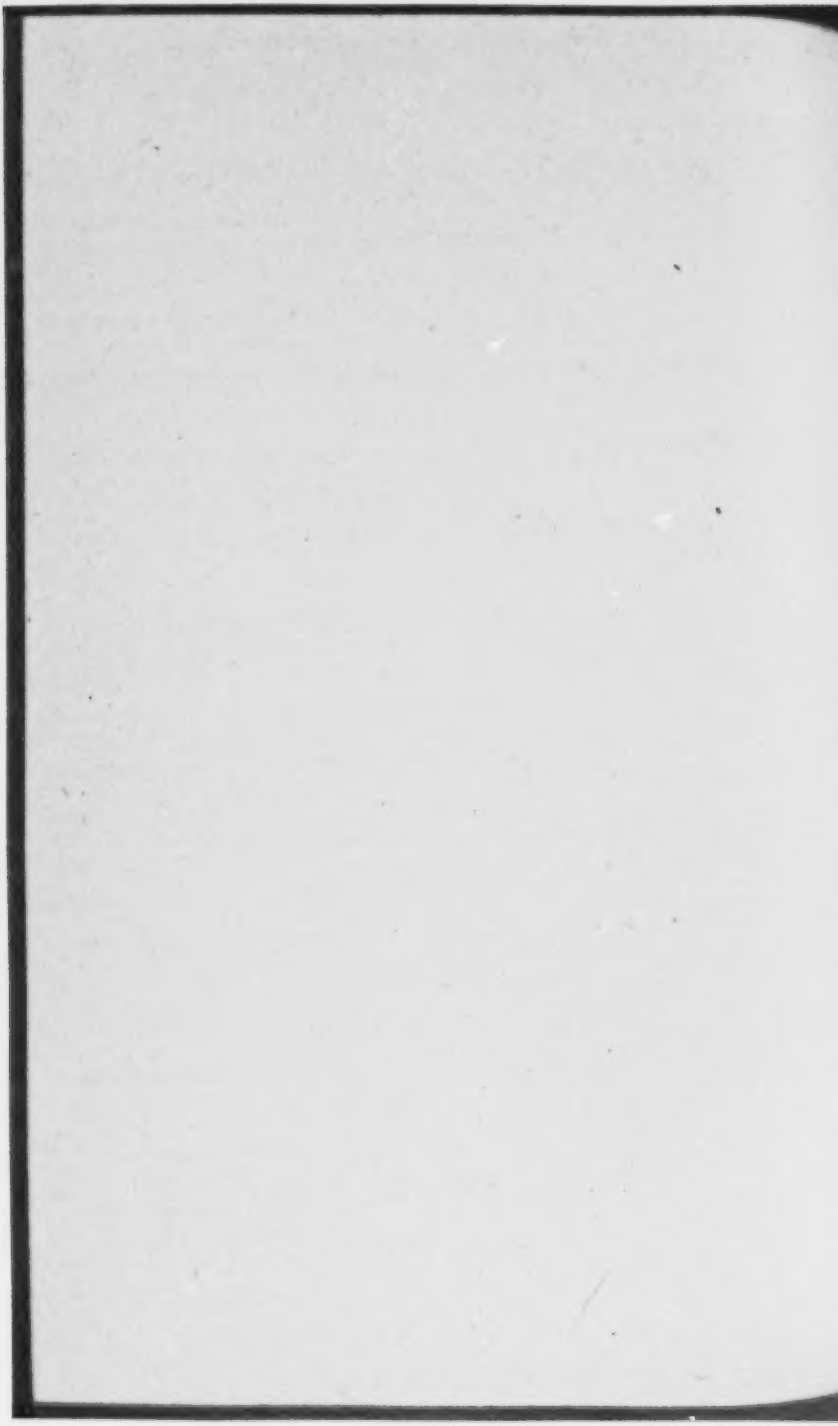

1 In United States Circuit Court of Appeals for the Second Circuit

Ex Parte United States of America

In the Matter of the Application of UNITED STATES OF AMERICA, PETITIONER, FOR A WRIT OF PROHIBITION AND/OR MANDAMUS

vs.

THE HONORABLE FRANCIS G. CAFFEY, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, AND THE OTHER JUDGES AND OFFICERS OF SAID COURT, RESPONDENTS

Order to show cause

April 28, 1943

The United States of America having moved in the above-captioned matter for leave to file its petition for a writ of prohibition and/or a writ of mandamus and for a rule to show cause why such writs should not issue as prayed in said petition, it is

Ordered that the District Court of the United States for the Southern District of New York and the Honorable Francis G. Caffey, a judge thereof, and the other judges and officers of said court, are directed to show cause before this Court on the 3rd day of May 1943, at 10:30 o'clock in the forenoon of said
2 day, or as soon thereafter as counsel may be heard, why the motion of the United States of America for leave to file its said petition should not be granted; and it is further

Ordered that the attention of counsel is directed to the question whether this Court has jurisdiction of the proceeding sought to be instituted by the filing of said petition (See Muir v. Chatfield, 255 Fed. 24. But see Ex Parte Republic of Peru, U. S. Supreme Court, October Term, 1942, No. 13 Original, decided April 5, 1943); and that the argument on the return of this order to show cause shall be confined to said question; and it is further

Ordered that service shall be made by leaving a copy of this order together with a copy of said petition and said motion with the Clerk of the United States District Court for the Southern District of New York on or before the 29th day of April 1943.

THOMAS W. SWAN,
United States Circuit Judge.

Dated April 28, 1943.

3 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Motion for leave to file petition for writ of prohibition and/or writ of mandamus

Filed May 3, 1943

Now comes the United States of America and moves:

1. For leave to file the petition for a writ of prohibition *a* and/or a writ of mandamus, hereto annexed; and

2. That a rule be entered and issued directing the District Court of the United States for the Southern District of New York and the Honorable Francis G. Caffey, a judge thereof, and the other judges and officers of said court, to show cause why a writ of prohibition and/or a writ of mandamus should not issue against them and each of them, in accordance with the

4 prayer of said petition, and why the United States of America should not have such other and further relief therein as may be just.

FRANCIS M. SHEA,
Assistant Attorney General,
Department of Justice, Washington, D. C.,
Attorney for Petitioner.

Of Counsel:
SIDNEY J. KAPLAN,
J. FRANK STALEY,
Special Assistants to the Attorney General,
ARNOLD W. KNAUTH,
Attorney, Department of Justice.

5 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted:]

Petition for a writ of prohibition and/or a writ of mandamus

The petition of the United States of America for a writ of prohibition and/or a writ of mandamus against the Honorable Francis G. Caffey, Judge of the District Court of the United States for the Southern District of New York and against the other judges and officers of said court, respectively shows:

I. On April 15, 1942, there was filed in the United States District Court for the Southern District of New York sitting in

admiralty by Agwilines, Inc., a Maine corporation, a cer-
6 tain libel in a cause of collision, civil and maritime entitled "Agwilines, Inc., as owner of the Steamship 'Brazos' and as bailee of the cargo laden therein, against The United States of America" being docketed In Admiralty No. 124–337. A true copy of said libel is hereunto annexed marked "Exhibit A." Process in the usual form was issued in said cause and served on the United States.

II. As appears more fully from Exhibit A hereunto annexed, said libel alleged ownership by libellant of the Steamship "Brazos"; that the "Brazos" had on January 13, 1942, been in collision with a certain motor vessel, formerly named "Moremacland," due solely to the fault and negligence of said motor vessel and those in charge of her; and that as a result of the collision libellant had sustained damages including loss of the Steamship "Brazos" and her cargo and personal effects of those on board her and other expenses in the sum of $850,000. The libel alleged ownership by the United States of the said motor vessel, and that at the time of the collision said motor vessel was a public vessel of the United States, and invoked the jurisdiction of the United States District Court under the Public Vessels Act of March 3, 1925, c. 428, 43 Stat. 1112 (46 U. S. C. 781–790), and prayed recovery of damages from the United States.

III. Thereafter, and in proper time, the United States of America, respondent in said cause, appearing specially, excepted to said libel for want of jurisdiction of the District Court and filed of record exceptive allegations. A true copy of said exceptive allegations is hereunto annexed marked Exhibit B.

IV. As appears more fully from Exhibit B hereunto
7 annexed, said exceptive allegations showed that the vessel referred to as formerly named "Mormacland" was not a merchant vessel nor a tugboat; that she was a vessel of war, renamed H. M. S. "Archer", in the possession and under the exclusive command and control of the British Government, and commissioned, officered, manned, supplied, and operated by that Government. The exceptive allegations showed that the H. M. S. "Archer" had this status at the time of the collision and ever since November 17, 1941, when the United States, being the owner of the "Mormacland," delivered the vessel to Their Lords Commissioners of the Admiralty, on behalf of His Brittanic Majesty pursuant to the provisions of the Lend Lease Act of March 11, 1941, c. 11, 55 Stat. 31 (Title 22 U. S. C. 1940 ed., Sup. I, Secs. 411–422).

V. Said exceptive allegations concluded that by reason of the matters therein shown, H. M. S. "Archer" being a vessel of war and not having been employed as a merchant vessel

and not being a tugboat, and being a public vessel of the United Kingdom rather than a public vessel of the United States, the said proceeding in the District Court is outside the scope of the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525 (Title 46 U. S. C. Secs. 741–752) and of the Public Vessels Act of March 3, 1925, c. 428, 43 Stat. 1112 (Title 46 U. S. C. Secs. 781–790); is a suit against the United States without its consent; and is outside the jurisdiction of the District Court.

VI. Following the filing of said exceptive allegations by the United States, certain parties, being Olivarria & Co., Inc., and others, as intervening-petitioners obtained leave of the District Court to intervene in said cause as owners of the cargo laden on the "Brazos" and filed a petition substantially copying the
8 allegations of the libel and praying recovery of damages from the United States for the alleged injury to said cargo in the sum of $142,000. A true copy of said intervening-petition is hereunto annexed marked "Exhibit C."

VII. The United States consented to the said intervention without prejudice to its exceptive allegations, and it was agreed by the intervening-petitioners that the exceptive allegations be considered as applying to the intervening-petition as well as to the libel.

VIII. The facts alleged in said exceptive allegations were accepted as true and not disputed by either the libellant or the intervening-petitioners. Instead, the libellant brought on said exceptive allegations for argument and moved the District Court for an order to strike out said exceptive allegations, and the intervening-petitioners joined in said motion. The motion was argued before Honorable Francis G. Caffey, United States District Judge, on February 2, 1943. Thereafter, on March 13, 1943, District Judge Caffey filed an opinion, wherein for reasons stated he announced that the motion would be granted. A true copy of said opinion is hereunto annexed marked "Exhibit D." In said opinion he held that the H. M. S. "Archer" was a "public vessel of the United States" within the meaning of that phrase in the Public Vessels Act, and that the District Court had jurisdiction of the cause. Thereupon, the said court assumed jurisdiction of the cause and is proceeding to hear and determine the merits thereof.

IX. Thereafter, by order dated April 3, 1943, signed by District Judge Caffey and entered in said cause, the motion of the libellant and intervening-petitioners for an order striking out the exceptive allegations was granted in all respects; and it was
9 ordered that the exceptive allegations were dismissed and that the United States was directed to appear and answer the libel and the intervening petition. A true copy of said order is hereunto annexed marked "Exhibit E."

X. As appears from the foregoing, the undisputed facts set forth in the exceptive allegations, stricken and dismissed by the District Court, showed that the sole relationship of the United States to the matter sued on is that, being the owner of the "Mormacland," the United States delivered the vessel to the British Government as lend-lease aid, who in turn commissioned her in the British Navy as a vessel of war, renamed H. M. S. "Archer," and who operated her in that status at the time of the collision.

XI. Petitioner submits that by reason of the matters set forth in the exceptive allegations above referred to, the District Court was and is without jurisdiction to proceed to hear and determine the matters alleged in the libel and intervening petition; that the District Court is proceeding wholly without jurisdiction over the said cause, and in excess of its jurisdiction; that the District Court erred in striking and dismissing the exceptive allegations which showed its lack of jurisdiction; and that the District Court erred in holding that on the facts presented by said exceptive allegations the H. M. S. "Archer" was a "public vessel of the United States" within the meaning of that phrase in the Public Vessel Act which consents to suit against the United States "for damages caused by a public vessel of the United States."

XII. The order made by District Judge Caffey dated April 3, 1942, is not an appealable order, and the question of the jurisdiction of the District Court over said cause can be presented on appeal only by an appeal after answer and trial on the merits and a resulting decree determining the rights and liabilities of the parties. The availability of such an appeal ultimately is a wholly inadequate remedy, since the United States would be put to the burden of an elaborate investigation and trial and since the facts, evidence, and witnesses to the issues on the merits are in the control of the British Navy. The difficulties thus presented, together with the importance of not diverting naval personnel from combat functions during this time of war, will render the government's preparation and defense on the merits wholly inadequate.

XIII. Petitioner further submits that the question presented of the jurisdiction of the District Court in these circumstances is a question of large importance warranting prompt and authoritative determination. Numerous vessels have been delivered to our allies as lend-lease aid. Should the District Court's decision be upheld ultimately, further legislation or international arrangements may prove desirable in order to protect the interests of the United States. Such treatment would be premature pending authoritative determination of the question now presented. If the

consideration of that question by the appellate courts must await the District Court's adjudication on the merits, the time necessarily consumed pending such adjudication will unduly delay obtaining an authoritative determination of the important jurisdictional question now presented.

XIV. Jurisdiction of this Court is invoked under Section 262 of the Judicial Code (Title 28 U. S. C. Sec. 377) empowering this court to issue all writs necessary to the exercise of its jurisdiction.

11 This court would have appellate jurisdiction on appeal from any final decree in said cause or from any interlocutory decree determining the rights and liabilities of the parties, under Sections 128 and 129 of the Judicial Code (Title 28 U. S. C. Secs. 225, 227), and the jurisdiction of this Court to issue a writ of prohibition and/or a writ of mandamus in aid of said appellate jurisdiction is hereby invoked.

Wherefore the United States of America, the aid of this honorable court respectfully requesting, prays:

1. That a writ of prohibition may issue out of this honorable court to the said Honorable Francis G. Caffey, Judge of the United States District Court for the Southern District of New York, and/or the other judges and officers of said court, prohibiting him and them from taking any steps whatsoever in the cause aforesaid, other than to dismiss the same for want of jurisdiction, and generally from the further exercise of jurisdiction, in said sause, or the enforcing of any order, judgment, or decree made under color thereof.

2. That a writ of mandamus may issue out of this honorable court, directing and commanding the Honorable Francis G. Caffey, Judge of the United States District Court for the Southern District of New York, or such other of the judges of the said court as may be assigned to the matter, to vacate the order of April 3, 1943, so entered by him, striking and dismissing the exceptive allegations of the United States and directing the United States to answer the libel and intervening petition, and further to enter an order in said cause dismissing the libel and the intervening petition for want of jurisdiction.

3. That the court grant to the United States of America

12 such other and further relief as may be just in the premises.

FRANCIS M. SHEA,
Assistant Attorney General,
Department of Justice, Washington, D. C.,
Attorney for Petitioner.

Of Counsel:
SIDNEY J. KAPLAN,
J. FRANK STALEY,
Special Assistants to the Attorney General,
ARNOLD W. KNAUTH,
Attorney, Department of Justice.

13 [*Duly sworn to by Francis M. Shea; jurat omitted in printing.*]

14 *Exhibit A to petition*

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libel of Agwilines, Inc., as owner of steamship "Brazos" and as bailee of the cargo laden therein, against the United States of America, in a cause of collision, civil and maritime, alleges upon information and belief as follows:

FIRST. At all the times hereinafter mentioned libellant was and now is a Maine corporation and owner of steamship "Brazos" which until the collision hereinafter set forth was tight, staunch, strong, and in all respects seaworthy and properly manned, outfitted, equipped, and supplied for the voyage in which she was engaged.

SECOND. At all the times hereinafter mentioned respondent was and now is a corporation sovereign and owner of the motor vessel formerly named "Moremacland." In May 1941, the custody of the vessel then named the "Moremacland" was transferred to the United States Navy and thereupon became a public vessel of the United States. Subsequent to the transfer of the custody of said vessel to the United States Navy her name was changed and at the time of the collision herein set forth said vessel was a public vessel of the United States.

THIRD. Upon information and belief the aforesaid vessel, formerly named "Moremacland," is outside of the territorial waters of the United States. Libellant has an office for the transaction of business at Pier 13, East River, within this District and within the jurisdiction of this Honorable Court.

FOURTH. On the night of January 13, 1942, steamship "Brazos," en route from Ponce, Puerto Rico, to New York City with general cargo, was navigating off the coast of South Carolina on a course designated by the United States Navy. Pursuant to orders
15 of the United States Navy, the "Brazos" displayed no lights of any kind. The weather was clear and dark, wind light N. W. The sea was moderate, with a light swell. While so proceeding, another vessel, which proved to be the aforesaid vessel,

formerly named "Moremacland," showing no lights, was observed on the starboard bow. The "Brazos's" red and green running lights were switched on immediately and the "Brazos's" rudder was put hard left. Said vessel, formerly named "Moremacland," however, instead of putting her rudder left, put her rudder hard right, bringing her on a course crossing the "Brazos's" bow from starboard to port, and her port side came into collision with the "Brazos's" stem, as a result of which both vessels were severely damaged. One member of the "Brazos's" crew was severely injured. The collision occurred at 9:28 p. m., "Brazos" time.

Examination of the "Brazos" after the collision showed that her fore part had been carried away. No. 1 hold was flooded, and the water was entering No. 2 hold. Despite the efforts of the officers and crew, the water continued to gain and she assumed a dangerous list to starboard and began sinking by the head, making it necessary to abandon the vessel shortly after 3 a. m. January 14, 1942. The "Brazos's" master, officers, and crew were transferred by the "Brazos's" lifeboats to said vessel, formerly the "Moremacland," which vessel brought them to Charleston, South Carolina.

After daylight on January 14 the "Brazos" was observed to be continuously settling by the head with her entire stern, including her rudder, propeller, and a good part of her keel, standing out of water. The "Brazos" was then in a hopeless condition, gradually going down, and she subsequently sank.

FIFTH. Said collision and the consequent damage sustained thereby were not caused or contributed to by any fault or neglect on the part of libellant or of steamship "Brazos" or of those in charge of her, but were due solely to the fault, negligence, and want of care of said vessel, formerly named "Moremacland," and those in charge of her in the following respects among others:

16 1. She was not in charge of a competent person.

2. She failed to keep a good lookout.

3. She failed seasonably to observe the course and position of the "Brazos."

4. She failed to display any or proper lights.

5. Upon sighting the "Brazos" she failed to switch on any running lights or other lights.

6. Although the two vessels were on courses whereby a starboard to starboard passage was safe and practicable, said vessel formerly named "Moremacland" carelessly and negligently altered her course to the right and across the course of the "Brazos."

7. She failed to sound a whistle signal indicating her alteration of course.

8. She failed to sound any or proper whistle signals.

9. She failed seasonably to stop or reverse her engines.

10. When danger of collision was or should have been apparent, she failed to take any or proper efforts to avoid collision.

SIXTH. By reason of the aforesaid collision libellant has sustained damages including the loss of steamship "Brazos" and her cargo and personal effects of those on board her, and other expenses in the sum of about $850,000.00 as nearly as may now be estimated, no part of which has been paid, although duly demanded.

SEVENTH. Libellant elects to have this suit proceed in accordance with the principles of libels in personam and in rem as provided in Section 3 of the act of Congress authorizing suits against the United States of America, approved March 9, 1920, and the act of Congress authorizing suits against the United States of America for damage caused by public vessels belonging to the United States, approved March 3, 1925.

EIGHTH. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

17 Wherefore libellant prays that respondent be required to appear and answer all and singular the matters aforesaid, and that this case be heard and determined according to the principles of law and the rules and practice obtaining in like causes between private parties, and that the Court make a decree in favor of libellant against respondent for the amount of libellant's damages, with interest and costs, and that libellant may have such other and further relief as to the Court may seem just and proper.

BURLINGHAM, VEEDER, CLARK & HUPPER,
Proctors for Libellant.

[*Duly sworn to by Chauncey I. Clark; jurat omitted in printing.*]

18 SIR: Take notice that the original libel of which the within is a copy, was this day duly filed herein in the office of the clerk of this Court.

Dated, New York, April 15, 1942.

Yours, etc.

BURLINGHAM, VEEDER, CLARK & HUPPER,
Proctors for Libellant,
27 William Street, Borough of Manhattan, New York City.

To Hon. FRANCIS BIDDLE,
U. S. Attorney General,
Proctor for Washington, D. C.

19 *Exhibit B to petition*

United States District Court for the Southern District of New York

In Admiralty No. A 124-337

AGWILINES, INC., AS OWNER OF THE STEAMSHIP "BRAZOS," AND AS BAILEE OF THE CARGO LADEN THEREIN, LIBELLANT

vs.

THE UNITED STATES OF AMERICA, RESPONDENT

Exceptive allegations of respondent

The respondent, United States of America, appearing specially herein, respectfully excepts to the libel filed herein for want of jurisdiction of this Honorable Court of the person of respondent and of the subject matter of this proceeding, and alleges as follows:

FIRST. At no time mentioned in the libel filed herein, nor at the time the said libel was filed, nor since, was the "Mormacland" (being the same vessel erroneously referred to in said libel as the "Moremacland") employed as a merchant vessel; nor was it a tugboat.

SECOND. (a) In April 1941 the British Government requisitioned, under the Act of March 11, 1941 (Public Law 11, 77th Congress, 1st Session), and acts amendatory thereof and supplementary thereto, a vessel of the type of the "Mormacland" for naval use as a vessel of war.

(b) Thereafter and in May 1941 the United States Maritime Commission, for the purpose of filling said requisition, purchased the "Mormacland" and the United States thereupon became the owner thereof.

(c) Thereupon, in May 1941, for the purpose of reconditioning said vessel and of making her suitable for the needs
20 for which the British Government had made its requisition, the Maritime Commission placed said vessel in the custody of the United States Navy at Newport News Shipbuilding and Drydock Company for conversion under the supervision of the United States Navy.

(d) On November 17, 1941, upon completion of said reconditioning, custody of said vessel was returned by the United States Navy to the Maritime Commission.

(e) Thereupon, and on November 17, 1941, the said vessel was physically delivered by the Maritime Commission to Their Lords Commissioners of the Admiralty, on behalf of His Britannic

Majesty; and Their Lords Commissioners of the Admiralty on November 17, 1941, in accepting said delivery executed a receipt therefor reading as follows:

"NORFOLK, VIRGINIA,
November 17, 1941.

Their Lords Commissioners of the Admiralty, on behalf of His Britannic Majesty, hereby accept from the United States Maritime Commission physical delivery of the vessel named "Archer" (ex-"Mormacland"), at 11 A. M., Eastern Standard Time, on November 17, 1941, at Norfolk Navy Yard, located at Portsmouth, Virginia, said delivery being made pursuant to the provisions of Public Law 11, 77th Congress, 1st Session, approved March 11, 1941, and statutes amendatory thereof and supplementary thereto, for utilization under charter or other arrangements to be hereafter mutually agreed upon.

This receipt is executed in three counterparts.

THEIR LORDS COMMISSIONERS OF THE ADMIRALTY,
By (S) J. I. ROBERTSON (*Official Title*),
J. I. Robertson, *Commander, R. N.*"

(f) From November 17, 1941, and continuously thereafter, said vessel has, with the consent of the United States, been in the possession and under the exclusive command and control of the British Government, and commissioned, officered, manned, supplied, and operated by that Government, as a vessel of war.

(g) Prior to the delivery on November 17, 1941, the American documentation of said vessel was cancelled and immedi-
21 ately after said delivery said vessel was, with the consent of the United States, documented in Great Britain and commissioned as a vessel of the Royal Navy, renamed H. M. S. "Archer," and has continued to be so documentated, commissioned, and named ever since.

(h) The delivery of said vessel on November 17, 1941, in accordance with the terms of the receipt set forth above, was necessitated by emergency conditions requiring the actual delivery of some defense articles in anticipation of the contemplated Master Agreement to be entered into between the two Governments under which assistance would be reciprocally given and received. Such a Master Agreement was executed by the two Governments on February 23, 1942. The preamble of said agreement, recites the expediency of having the final determination of the terms and conditions upon which aid would be mutually given deferred until the progress of events had made clearer what the final terms should be. Article I of said Agreement provides that the United States will continue to supply the United Kingdom with such defense articles, defense services and defense in-

formation as the President shall authorize to be transferred or provided. Article V of said Agreement provides that the United Kingdom will return at the end of the emergency, as determined by the President, such articles transferred under said Agreement as shall not have been destroyed, lost, or consumed, and as shall be determined by the President to be useful in the defense of the United States or the western hemisphere or to be of use otherwise to the United States.

THIRD. By reason of the foregoing, said vessel being a vessel of war and not having been employed as a merchant vessel and not being a tugboat, and being a public vessel of the United Kingdom rather than a public vessel of the United States, this proceeding is outside the scope of the Act of March 9, 1920 (Suits in Admiralty Act) and of the Act of March 3, 1925 (Public Vessels Act); is a suit against the United States without its consent; and is outside the jurisdiction of this Honorable Court.

22 Wherefore, respondent prays that the libel herein be dismissed with costs.

MATHIAS F. CORREA,
United States Attorney, appearing specially,
45 Broadway, New York, N. Y.

23 *Exhibit C to petition*

United States District Court, Southern District of New York

A 124–337

AGWILINES, INC., AS OWNER OF THE STEAMSHIP "BRAZOS" AND AS BAILEE OF THE CARGO LADEN THEREON, LIBELLANT

vs.

THE UNITED STATES OF AMERICA, RESPONDENT

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The petition of Olavarria & Co., Inc., as owner of a cargo of twenty thousand (20,000) bags of refined sugar laden on board the S. S. "Brazos" and of Porto Rican American Sugar Refinery, Inc., The Commercial National Bank & Trust Co., Porto Rican Express Co., Manfield Handkerchief Company, Ponce & Mayaguez Drawnwork & Embroidery Co., Delia Mejia, Inc., G. H. & E. Freydberg, Inc., Puerto Rican Price-Stabilizing Corporation, Balzac Bros. & Co., Inc., Jerry Dress Co., Incorporated, Bernhard Wolf, Asociacion Azucarera Cooperativa Lafayette, Wm.

S. Gray & Co., Lay-Textiles, Inc., American Insurance Company of Newark, The Continental Insurance Company of New York, Hartford Fire Insurance Company, Universal Insurance Company, Federal Insurance Company and Westchester Fire Insurance Company, owners and/or shippers and/or consignees or underwriters of general cargo laden on board the S. S. "Brazos" intervening for their own interest in the suit instituted by Agwilines, Inc., as owner of the S. S. "Brazos" and as bailee of the cargo laden thereon, against the United States of America in a cause of collision, civil and maritime, respectfully alleges upon information and belief as follows:

FIRST. Your petitioner, Olavarria & Co., Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its principal office and place of business at 99 Wall Street, Borough of Manhattan, City,
24 County and State of New York, which is within this District and within the jurisdiction of this Honorable Court, and the owner of a cargo consisting of 20,000 bags of sugar in good order and condition laden on the S. S. "Brazos" at the time of the collision as hereinafter set forth.

SECOND. The other petitioners above mentioned are variously domiciled and at all the times mentioned herein were and now are corporations organized and existing under and by virtue of the several states of the United States or of foreign states, territories or countries or are copartnerships, associations or individuals and at the time of the collision hereinafter mentioned, were the owners and/or shippers and/or consignees or underwriters of various shipments of general cargo in good order and condition laden on the S. S. "Brazos," and those of the above mentioned petitioners who were shippers and/or consignees and not the owners of the said cargo at the time of the collision as hereinafter set forth, file this petition not only on their own behalf as shippers and/or consignees but as agents for, and on account of, the owners thereof.

THIRD. The respondent, United States of America, was and now is a corporation sovereign and the owner of the motor vessel formerly named "Moremacland." In May 1941, the custody of the vessel then named "Moremacland" was transferred to the United States Navy and thereupon became a public vessel of the United States. Subsequent to the transfer of the custody of said vessel to the United States Navy, her name was changed and at the time of the collision hereinafter mentioned the said vessel was a public vessel of the United States.

FOURTH. Upon information and belief the aforesaid vessel, formerly named "Moremacland," is now outside of the territorial waters of the United States but during the pendency of process

herein will be within this District and within the jurisdiction of this Honorable Court.

FIFTH. On the night of January 13, 1942, the S. S. "Brazos," en route from Ponce, Puerto Rico, to New York City with
25 general cargo, including your petitioners' cargo, was navigating off the coast of South Carolina on a course designated by the United States Navy. Pursuant to orders of the United States Navy the "Brazos" displayed no lights of any kind. The weather was clear and dark, wind light N. W. The sea was moderate, with a light swell. While so proceeding, another vessel, which proved to be the aforesaid vessel, formerly named "Moremacland," showing no lights, was observed on the starboard bow. The "Brazos'" red and green running lights were switched on immediately and the "Brazos'" rudder was put hard left. Said vessel, formerly named "Moremacland," however instead of putting her rudder left, put her rudder hard right, bringing her on a course crossing the "Brazos'" bow from starboard to port, and her port side came into collision with the "Brazos'" stem, as a result of which both vessels were severely damaged. One member of the "Brazos'" crew was severly injured. The collision occurred at 9:28 p. m., "Brazos" time.

Examination of the "Brazos" after the collision showed that her fore part had been carried away. No. 1 hold was flooded, and the water was entering No. 2 hold. Despite the efforts of the officers and crew, the water continued to gain and she assumed a dangerous list to starboard and began sinking by the head, making it necessary to abandon the vessel shortly after 3 a. m., January 14, 1942. The "Brazos'" master, officers, and crew were transferred by the "Brazos'" lifeboats to said vessel, formerly the "Moremacland," which vessel brought them to Charleston, South Carolina.

After daylight on January 14 the "Brazos" was observed to be continuously settling by the head with her entire stern, including her rudder, propeller, and a good part of her keel, standing out of water. The "Brazos" was then in a hopeless condition, gradually going down, and she subsequently sank.

26 SIXTH. The aforesaid collision and consequent loss of petitioners' cargo were not caused or contributed to by any fault, negligence, or want of care on the part of your petitioners or those for whom your petitioners were or are responsible but were caused or contributed to by the fault, negligence, and want of care on the part of the said vessel, formerly named "Moremacland," and those in charge of her in the following respects among others which will be pointed out upon the trial of this action:

1. She was not in charge of a competent person.

2. She failed to keep a good lookout.

3. She failed seasonably to observe the course and position of the "Brazos."

4. She failed to display any or proper lights.

5. Upon sighting the "Brazos" she failed to switch on any running lights or other lights.

6. Although the two vessels were on course whereby a starboard to starboard passage was safe and practicable, said vessel formerly named "Moremacland" carelessly and negligently altered her course to the right and across the course of the "Brazos."

7. She failed to sound a whistle signal indicating her alteration of course.

8. She failed to sound any or proper whistle signals.

9. She failed seasonably to stop or reverse her engines.

10. When danger of collision was or should have been apparent, she failed to take any or proper efforts to avoid collision.

SEVENTH. By reason of the premises your petitioners have been damaged in the sum of $142,000.00 as nearly as the same can now be estimated, no part of which has been paid although payment thereof has been duly demanded.

EIGHTH. That on or about April 15, 1942, a libel was filed in this Court by Agwilines, Inc., as owner of the S. S. "Brazos," and as bailee of the cargo laden thereon, including your
27 petitioners' cargo hereinbefore referred to against The United States of America, as owner and operator of the motor vessel, formerly named "Moremacland," a public vessel of The United States of America, under the provisions of an Act of Congress approved March 3, 1925, entitled: "An Act Authorizing Suits Against The United States in Admiralty for Damages Caused by and Salvage Services Rendered to Public Vessels Belonging to the United States and for other Purposes," otherwise known as the "Public Vessels Act" (U. S. C., Tit. 46, Section 781, et seq.), praying for the recovery of damages to the S. S. "Brazos" and the cargo laden thereon, including your petitioners' cargo. Your petitioners now desire to intervene for their own interest in the said libel and the action based thereon.

NINTH. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, your petitioners pray that they be allowed to intervene in this suit for their own interest and that the respondent, The United States of America, be required to answer this petition and that this Honorable Court will decree to your petitioners against the respondent, The United States of America, their damages with interest and costs and that this Court will grant

such other and further relief to petitioners as to the Court may seem just and proper.

BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for Petitioners,
Office & P. O. Address, 99 John Street, New York, N. Y.

28 *Exhibit D to petition*

United States District Court, Southern District of New York

A 124–337

AGWILINES INC., AS OWNER OF THE STEAMSHIP ------, AND AS BAILEE OF THE CARGO LADEN THEREON, LIBELANT

vs.

THE UNITED STATES OF AMERICA, RESPONDENT

OLAVARRIA & CO., INC., ET AL., INTERVENING-PETITIONERS

Burlingham, Veeder, Clark & Hupper, Esqs., Proctors for Libelant; Eugene Underwood, Esq., of Counsel.

Bigham, Englar, Jones & Houston, Esqs., Proctors for Intervenors; Leonard J. Matteson, Esq., and Richard F. Shaw, Esq., of Counsel.

Mathias F. Correa, Esq., United States Attorney, Proctor for Respondent; Francis M. Shea, Esq., Assistant Attorney General, Harold B. Finn, Esq., Special Assistant to the Attorney General, and Allen B. Lutz, Esq., Attorney, Department of Justice, of Counsel.

MEMORANDUM ON RESPONDENT'S CLAIM OF EXEMPTION FROM JURISDICTION

In this suit damages from a collision between two vessels are sought to be recovered by the owner of one of the vessels and the owner of the cargo. In conformity with the spirit of admiralty rule 46, the names of the libelant's steamship has been omitted from the caption of the suit, and hereafter it will be referred to as A. So also the name of the vessel charged in the libel with fault in colliding with and injuring A will not be given in this memorandum, and it will be referred to as X.

29 I shall discuss only the contest over jurisdiction. The issue is raised by libelant's motion to strike out respondent's exceptive allegations. The intervenors have substantially copied, as well as adopted, the allegations of the libel. They have also joined in the motion.

I

It will be necessary to consider three statutes. These are (1) the Public Vessels Act of March 3, 1925, c. 428 (43 Stat. 1112–13; 46 U. S. C. A., secs. 781–90); (2) the Suits in Admiralty Act of March 9, 1920, c. 95 (41 Stat. 525–8; 46 U. S. C. A., secs. 741–52); and (3) the Lend Lease Act of March 11, 1941, c. 11 (55 Stat. 31–3; 22 U. S. C. A., secs. 411–22). Speaking generally, so far as concerns the instant controversy, the 1925 Act relates to public vessels; the 1920 Act relates to merchant vessels; and the 1941 Act, during the present emergency, authorizes the lease, loan, or other disposition by the United States to the government of any country whose defence the President deems vital to the defense of the United States, on such terms as he deems satisfactory, of any vessel or other defense article, as well as the release for export of any such article to any such government.

The Public Vessels Act provides for suits in admiralty against the United States "for damages caused by a public vessel of the United States." This is the basis on which the libelant and the intervenors rest their claim of a right to maintain the present suit. Whether the claim is well founded involves only a question of statutory construction. It is indisputably clear, and no one has suggested otherwise than, that the Congress was empowered to enact the legislation.

The crucial words about which there is debate are "public vessel of the United States." When the collision occurred X was, and ever since has been, a war vessel. During all that time it was, and still is, a part of the British navy. Likewise throughout that period it has been, and still is, the property of the United States.

30 The exceptive allegations show, as will be set out later more in detail, that (1), when acquired by the United States, X was a merchant vessel; (2) it was converted by the United States into a war vessel; (3) thereafter, some time preceding the collision, pursuant to the Lend-Lease Act, it was turned over to the British government and went into the British navy. Among the provisions in the arrangement between the British government and our own government is a requirement that, after the end of the emergency, on the President's demand, X be returned to the United States.

So far as appears, the vessel is still in the British navy. As I understand counsel, they agree that, for the purposes of this case, the terms on which the vessel is held by Great Britain are the legal equivalent of a bare-boat charter.

If jurisdiction of the suit exist, it is vested in a district court of the United States and, as I believe all concede, proper venue is

in this district. So the sole question is whether this court has such jurisdiction.

The Public Vessels Act (in a way that will be gone into hereafter), for use in suits thereunder, adopts certain provisions of the Suits in Admiralty Act. For the better understanding of the former, I think it will be well, therefore, first to call attention to several features of the latter; particularly because the two statutes are in pari materia (State of Maine v. United States, 45 Fed. Supp. 35, 37).

The Suits in Admiralty Act mentions three kinds of vessels to which it will be pertinent now to refer. These are (1) those "owned by the United States" (section); (2) those "privately owned" or "privately owned or operated" or "privately owned and possessed" or "privately owned * * * not in the possession of the United States" (sections 2, 3, 4); and (3) "merchant vessel" or "merchant vessel owned or operated by the United States" (sections 9, 10, 11).

The more important provisions of that act which are of interest in the present suit are contained in sections 2 and 3.
31 In section 2 it is said that "in cases where if such vessel [that is, one owned by the United States] were privately owned or operated, * * * a proceeding in admiralty could be maintained * * *, a libel in personam may be brought against the United States * * *." In section 3 it is said that "such suits shall proceed and shall be heard and determined according to the principles of law * * * obtaining in like cases between private parties. * * * If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel * * * been privately owned or possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit."

A less important provision is in section 7. There the Secretary of State is authorized, through a local or nearby United States consul, to seek immunity or release from seizure (under process of a court of another country) of any vessel within the purview of sections 1 and 4 of the act (including "any vessel owned by the United States").

The controversy turns on, and is confined to, two questions. These are: (1) At the time of the collision was X a "public vessel"? (2) If so, was it a public vessel "of" the United States?

II

In the first place, it should be noted that in section 3 of the Public Vessels Act the words "privately owned vessels" are used by way of contradistinguishing those vessels from public vessels of the United States mentioned in section 1 of the statute. The obvious implication is that a "public vessel," as the words are employed in section 1, is intended to describe a vessel owned by the public. Otherwise, as it seems to me, the language would be robbed of significance. I conceive of no plausible or rational meaning being attributed to the contrast between the two sets of words unless it be that which I have assigned. Where language is plain, acceptance of its ordinary sense is the only sound method of arriving at its meaning (U. S. v. Union Pacific R. R. Co., 91 U. S. 72, 86; Old Colony R. Co. v. Commissioner, 284 U. S. 552, 560; U. S. v. Resnick, 299 U. S. 207, 210).

32 In the second place, section 2 of the Public Vessels Act provides that suits brought against the United States under section 1 "shall be subject to and proceed in accordance with the provisions of" the Suits in Admiralty Act. I have heretofore enumerated several instances of uses in the latter statute of words and expressions in contrast with the words "public vessel" employed in the former. Because the two statutes are in pari materia, save to the extent (if any) to which they may be inconsistent, provisions of the earlier are by reference, in effect, incorporated into the latter. In consequence, I feel that contrasts in phraseology relied on above are greatly emphasized (Cf. U. S. v. Stewart, 311 U. S. 60, 64–5).

In the third place, the respondent claims that X was not a public vessel of the United States after it was taken over by Great Britain or while it has been operated by the British navy. On the other hand, the contention is that, after the vessel passed into British control, it was a public vessel of Great Britain, rather than a public vessel of the United States.

At the moment I am not concerned with determining the country of which X is a vessel. At this state the inquiry is merely whether, at the date of the collision, X was or since has been a "public vessel."

However all I have said on the point may be, as I read the authorities the Supreme Court has settled (what appears to me obvious) that any navy vessel is a public vessel. The decisions so holding, specifically or in cinciple, are numerous. Among them are the following: The "Exchange," 7 Cranch 116, 141–4; Re "New York," 256 U. S. 503, 510–11; "The Western Maid," 257 U. S. 419, 431–2; Berizzi Bros. Co. v. S. S. "Pescaro," 271 U. S. 562, 574.

III

If, therefore, within the meaning of the Public Vessels Act, X be a public vessel, our sole further inquiry is whether, because it is the property of the United States, it is, within the meaning of the statute, a vessel "of" the United States.

33 (1) The natural meaning of the words "vessel of the United States" is a vessel belonging to or owned by the United States (Ellis v. United States, 206 U. S. 246, 259; Poe v. Seaborn, 282 U. S. 101, 109). As said in the latter case, "The use of the word 'of' denotes ownership. It would be a strained construction, which, in the absence of further definition by Congress, should impute a broader significance to the phrase."

(2) If, however, this be not clear on the face of the language employed, then examination of the legislative history of and of the title to the Public Vessels Act will remove the doubt.

In Apex Hosiery Co. v. Leader, 310 U. S. 469, 489, where there was vagueness in a statute, it was said that "it is appropriate that the courts should interpret its word in the light of its legislative history." The opinion in Duplex Co. v. Deering, 254 U. S. 443, went further. It specified definitely at least one thing included in the legislative material at which, in the event of ambiguity, it is permissible for courts to look in an effort correctly to construe a statute. With respect to the matter the following statement was made (pp. 474–5):

"* * * reports of committees of House or Senate stand upon a more solid footing [than Congressional debates, which had just been mentioned], and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of the statute is obscure."

The number of the bill which resulted in the Public Vessels Act was H. R. 9535. Senate Report No. 941 on that bill at the Second Session of the 68th Congress, under date of January 26, 1925, incorporated House Report No. 913 on the same bill made at the First Session of the 68th Congress (both reports being hereafter spoken of as if they constituted but a single report). Throughout the report the bill was referred to as proposed legislation relating to "public vessels belonging to the United States." This points directly to the conclusion that the phrase "public vessels of the United States" was designed to embrace all public vessels "owned" by the United States.

34 The report, however, was not devoted merely to nomenclature. It contained two particularly relevant provisions of substance. These were as follows:

(1) It was plainly indicated that the aim was to render reciprocal certain rights (for example, with respect to damages

resulting from collision) as between privately owned and Government-owned vessels. If the statute were not construed as conferring on the private owner of a vessel the right to pursue a Government-owned vessel which by negligence inflicted injury on the privately owned vessel, as if the proceeding were in rem and were in effect against the vessel, qua vessel, although in form only in personam (so as to avoid seizure), the right acquired through the legislation by such a vessel owner would not be on a par, nor would it even approach being coextensive, with the right under existing law of the Government to subject to the satisfaction of its claim a privately owned vessel, qua vessel, in an in rem proceeding. Among the things said in the report on this phase of the matter were the following:

"Under the law as it now stands, no judicial relief is available to a shipowner for damages caused by the negligent navigation of a public vessel of the United States. His only recourse is to apply to Congress for a private act, which will enable him to have the matter adjudicated in a district court of the United States, or in the Court of Claims. Such relief, if granted, is granted only as an act of grace; it may not be demanded as a right. It is a procedure, moreover, which entails many and peculiar hardships to a suitor. * * *

"Nevertheless, the United States, while immune from the action of a private suitor in such cases, may, and does, sue the vessels of private owners, has its day in court without the risk of costs being awarded against it, and, when the Government vessel is found to have been at fault, refuses to pay the damages sustained by the private owner. * * *

"The injustice of such a system of relief has often been expressly recognized by Congress and by the courts. * * *

"The theory of immunity on the part of the sovereign has been found to be unworkable, and has been materially departed from by legislative or judicial action in all countries, and in some abandoned altogether. * * *."

From the foregoing it is manifest that the purpose of Congress was to get rid of what, in its view, was an injustice.

35 (2) Referring to bill H. R. 9535, the report contained an additional, and even more definite, statement as follows:

"The chief purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as the result of a collision with any Government-owned vessel, though engaged in public service, without requiring an application to Congress in each particular instance for the passage of a special enabling act."

If the Public Vessels Act were not construed to grant jurisdiction of the present suit, then, as seems to me, there would be a failure to accomplish the object Congress had in mind, as the report unequivocally declared, in enacting the legislation.

In the next place, it has been held that, while of slight weight, in order to clarify the meaning of a statute when there is doubt it is allowable to take its title into account (Hadden v. The Collector, 5 Wall. 107, 110; Bengzon v. Secretary of Justice, 299 U. S. 410, 416). In our attempt to solve the present problem, certainly the title may properly be considered.

The title of the Public Vessels Act is as follows:

"An Act Authorizing suits against the United States in admiralty for damage caused by and salvage services rendered to public vessels belonging to the United States, and for other purposes."

Not only is the title in complete harmony with the committee report on the bill while pending in Congress, but it confirms every other item of evidence as to what the statute means. All the evidence, summarized up to this point, convinces me that, within the terms of the Public Vessels Act, X was a "public vessel of the United States" at the time of the collision.

IV

There is independent, additional support, however, for the conclusion I have reached. This is derived from the provisions of the Public Vessels Act, either taken alone or when coupled with the Suits in Admiralty Act, in regard to procedure. These have already been stated briefly. They deserve fuller treatment.

36 Section 2 of the Public Vessels Act contains a provision as follows:

"Such suits [referring to suits against the United States described in section 1] shall be subject to and proceed in accordance with the provisions of an Act entitled 'An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes', approved March 9, 1920, or any amendment thereof, in so far as the same are not inconsistent herewith, * * *."

Section 3 of the Suits in Admiralty Act (being the Act of March 9, 1920, referred to in the last quotation above) contains a provision as follows:

"* * * If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever

it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained."

I think the two extracts just quoted go further in their effect than merely to prescribe procedure and that, in and of themselves, they constitute adequate basis for sustaining this court's jurisdiction to entertain the instant suit.

In paragraph 7 of the libel the libelant alleged, among other things, that it elected to have this suit proceed in accordance with the principles of libels in rem (as provided in section 3 of the Suits in Admiralty Act) and the intervenors have made the same election. It is manifest that if X had been "privately owned and possessed," a libel in rem could have been maintained for recovery of damages resulting from the collision (Cf. "The Moosabee", D. C., E. D. Virginia, 7 Fed. (2d) 501, 503, left hand column). It is equally true, under the general admiralty law, that, where there is liability, suit may be maintained against the offending vessel for recovery of damages, without regard to whether at the time of the injury the vessel was being operated by the owner or by a charterer ("The Barnstable", 181 U. S. 464). Speaking of a collision, it was there said (p. 467):

"* * * the law in this country is entirely well settled that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of anyone who is lawfully in possession of her, whether as owner or charterer."

37 In consequence, by force of the elections mentioned, both the libelant and the intervenors have entitled themselves to proceed with the present suit within the jurisdiction of this court.

V

There are several contentions—explicit or in effect—on behalf of the United States which should be considered. As to them I wish to add a few comments.

(1) Heretofore I have said that X became a vessel of the United States prior to being delivered to the navy of Great Britain. It may be argued that this has not been established. Yet I think it affirmatively appears by the exceptive allegations.

In paragraph 2 thereof it is alleged, in substance, as follows: (a) The British Government requisitioned a vessel of the type of X "for naval use as a vessel of war." (b) For the purpose of filling the requisition, the United States purchased X and "thereupon became the owner thereof." (c) and (d) For "the purpose of making her suitable for the needs for which the British Government had made its requisition," the United States Navy took custody of X and had her converted into a naval vessel. (e) Thereafter (some months in advance of the collision), pursuant

to the Lend Lease Act, X was delivered to the British Government, in fulfillment of the requisition therefor above mentioned, "for utilization under charter or other arrangements to be hereafter mutually agreed upon." (f) Ever since, with the consent of the United States, the British Government has had possession of and, under its exclusive command and control has operated, X "as a vessel of war." (g) Immediately after her delivery, with the consent of the United States, X was "commissioned as a vessel" of the British navy and has so continued since. (h) Delivery of such vessel was in accordance with a receipt therefor given by the Commissioners of the British Admiralty, was necessitated by emergency conditions requiring "the actual delivery of some defense articles" and the agreement between the two countries provides that "the United Kingdom will return at the end of the emergency, as determined by the President, such articles
38 transferred under said Agreement as shall not have been destroyed, lost, or consumed, and as shall be determined by the President to be useful in the defense of the United States or the western hemisphere or to be of use otherwise to the United States."

From the recitals just set out two things are plain: (1) Preceding the United States parting with possession of it, X had become and has remained a naval vessel. (2) Under the arrangement with Great Britain title to the vessel has never passed out of the United States.

Moreover, if ownership be the test of whether the statutes invoked make the United States subject to an in personam suit on admiralty principles applicable to in rem suits, the date when X became a navy vessel is of no consequence, provided it was—as in fact it was—a naval vessel at the time of the collision.

(2) The respondent suggests, as I understand, that, if it be held liable in the present suit for and pay damages arising from the collision, it would be an unjustifiable hardship on the United States to be put to negotiations with Great Britain for recoupment.

It seems to me, however, that there are several adequate answers. Among them are these two:

(a) In Section 7 of the Suits in Admiralty Act provision has been made for use (through our State Department) of diplomacy in procuring release from seizure abroad of vessels belonging to our nationals (such as A). If the question of ultimate responsibility, as between the United States and Great Britain, for the injury to X should arise, it would be no greater burden on the United States to negotiate in its own behalf than it would be on the owner of A itself to seek relief from Great Britain for the injury it has suffered.

(b) Following the war, under the Lend Lease Act—irrespective of whether leased property be or be not returned to the lessor—of necessity there must be determination of what sum, if any, is owing by the lessee on account of X. The burden of including such an item as would arise out of the present suit, if won by the libelant and the intervenors, and payment of the amounts decreed be made, manifestly would be slight in comparison with the burden on the libelant and the intervenors if driven to Great Britain for a remedy.

(3) The respondent has cited many court decisions turning on international law, the common law, or the general admiralty law. Save as the admiralty law must be resorted to for aid on construing words or expressions used in the statutes, I do not see any bearing such decisions have on the question of jurisdiction. I feel that I have demonstrated that the problem here is exclusively one of statutory interpretation.

(4) The respondent relies much on Blamberg v. United States, 260 U. S. 452, as well as on Carroll v. United States, 2nd Circ., 132 Fed. (2nd) —, decided February 9, 1943, which applied it. As I understand the Blamberg opinion, however, I do not think the case is in point.

The suit arose under the Suits in Admiralty Act and was decided in 1923—two years before the enactment of the Public Vessels Act. The owner of a cargo of corn carried on a barge brought suit in personam against the United States in the United States district court at Baltimore. The barge was owned, but was not operated, by the United States; nor did the United States or any one in its behalf make the contract of affreightment. On the contrary, throughout the period of the transaction the barge was in charge of a private individual, to whom the Government had contracted to sell it.

At the time suit was commenced the barge, with the cargo aboard, was and it continued in Cuba, where the barge had been libeled. In addition, in the United States in three districts outside of Maryland libels in personam, seeking recovery of sums aggregating more than the total value of the barge, had been filed against it. The Government insisted that the Baltimore suit was without jurisdiction.

The Supreme Court, construing the Suits in Admiralty Act (enacted in 1920), held that, because the barge was outside of Maryland, the district court there did not have jurisdiction.

In section 2 of the statute it was provided that suits in personam (under section 1), although in conformity with section 3 there was an election to proceed in accordance with the principles of libels in rem, "shall be brought in the district court of the United States for the district in which the

parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found." The facts did not bring the suit at Baltimore within any of those provisions. It was only under the conditions and in the courts prescribed by section 2 that consent was given by the Suits in Admiralty Act for the United States to be sued.

In this connection the court said in the Blamberg case (pp. 458, 459):

"* * * The first section of the act is limited in its inhibition of seizures of vessels and cargoes of the United States to ports of the United States and its possessions. The second section is in pari materia, and the same limitation must be implied in its construction.

"* * * All we hold here is that the District Court was right in construing the second section of the Suits in Admiralty Act not to authorize a suit in personam against the United States as a substitute for a libel in rem when the United States vessel is not in a port of the United States or of one of her possessions."

On the other hand, quite in contrast and in quite different terms, in section 2 of the Public Vessels Act (enacted in 1925), with respect to a suit—precisely like the suit at bar—under section 1 of that statute, it is provided as follows:

"Such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; * * *."

Unlike the 1920 act, the 1925 act specifically deals (in section 2) with a vessel "charged with creating the liability" (such as X here) and provides that "if such vessel * * * be outside the territorial waters of the United States" (as is true of X here), jurisdiction shall be exercised in the district court of the United States for the district "in which the parties so suing, or any of them, * * * have an office for the transaction of business in the United States" (such as the libelant has within the Southern District of New York).

41 In paragraph 3 of the libel in the case at bar it is alleged that, when suit was begun, X was outside the territorial waters of the United States and that the libelant then had an office for the transaction of business within this district. These allegations invoked jurisdiction expressly provided for in a clause

of the Public Vessels Act which was not included in the Suits in Admiralty Act.

In consequence I think the Blamberg case does not affect the question of jurisdiction in which we are interested.

Likewise I regard "The Western Maid," 257 U. S. 419, and numerous other decisions relied on by the respondent, which preceded the adoption of or which related to suits not counting on the Public Vessels Act, as distinguishable.

(5) I have endeavored to consider, and I believe I have considered, all the authorities brought to my attention that deal or are claimed to deal with the question of statutory interpretation. As I analyze them, however, no one of them impresses me as really contrary to the views I have expressed; or if any be at variance with those views, it is not binding on me.

(6) The respondent (reply brief, pp. 7–8, 10, 16, 17) has discussed section 9 of the Shipping Board Act of 1916, c. 451 (39 Stat. 730–1; 46 U. S. C. A., sec. 808). I have examined this, but it strikes me as too remote from the Public Vessels Act to influence the construction of any provision of the latter with which we are concerned in the present suit.

VI

As I view the matter, the crux consists of two propositions which rest on the Public Vessels Act. These are as follows: (1) Congress has conferred on the owners of private vessels in rem substantive rights. (2) For the enforcement of those rights it has provided, as an exclusive remedy, that there may be
42 resort to in personam procedure (Cf. Shewan & Sons v. United States, 266 U. S. 108, 111, 113; Eastern Transp. Co. v. United States, 272 U. S. 675, 689–91; United States v. Neptune Line, 4th Circ., 12 Fed. (2d) 568, 570, 571).

Accordingly, for the reasons heretofore assigned, the motion will be granted. Settle order on three days' notice. Dated, March 12, 1943.

(Sgd.) FRANCIS G. CAFFEY,
United States District Judge.

43 *Exhibit E to petition*

United States District Court, Southern District of New York

Ad. 124–337

AGWILINES, INC., AS OWNER OF STEAMSHIP "BRAZOS," AND AS BAILEE OF THE CARGO LADEN THEREON, LIBELLANT

vs.

THE UNITED STATES OF AMERICA, RESPONDENT, and OLAVARRIA & CO., ET AL., INTERVENING PETITIONERS

Respondent having appeared specially herein and filed exceptions to the libel for alleged want of jurisdiction of the Court of the person of the respondent and of the subject matter of this suit; and libellant having duly brought on said exceptive allegations for argument and having moved the Court for an order to strike out said exceptive allegations, and the Intervening Petitioners, Olavarria & Co., Inc., et al., having joined in the said motion, and said motion having regularly come on for argument on February 2, 1943, and having been argued and submitted to Honorable Francis G. Caffey, District Judge; and the Court, after due deliberation, having filed its opinion on March 13, 1943, granting libellant's motion;

Now, upon the opinion of the Court filed herein on March 13, 1943, and upon the libel, exceptive allegations and all other papers heretofore filed herein, and on motion of Burlingham, Veeder, Clark & Hupper, proctors for libellant, and Bigham, Englar, Jones & Houston, proctors for the Intervening Petitioners, Olavarria & Co., Inc., et al., it is

Ordered that the motion of the libellant and intervening petitioners for an order striking out the exceptive allegations filed on behalf of the respondent herein be, and the same hereby is, granted in all respects; and it is further

44 Ordered that the exceptive allegations filed on behalf of the respondent herein be, and they hereby are, dismissed, and respondent is directed to appear and answer the libel and the intervening petition herein within twenty days after service of a copy of this order, with notice of entry thereof upon the United States Attorney for the Southern District of New York.

Dated New York, N. Y., April 3, 1943.

FRANCIS G. CAFFEY, *U. S. D. J.*

46 In United States Circuit Court of Appeals for the Second Circuit

Ex Parte United States of America

In the Matter of the Application of UNITED STATES OF AMERICA, PETITIONER, FOR A WRIT OF PROHIBITION AND/OR MANDAMUS

vs.

THE HONORABLE FRANCIS G. CAFFEY, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, AND THE OTHER JUDGES AND OFFICERS OF SAID COURT, RESPONDENTS

Order denying motion for leave to file

May 3, 1943

The United States of America having moved in the above-captioned matter for leave to file its petition for a writ of prohibition and/or a writ of mandamus, and for a rule to show cause, and the court having considered the same, it is now

Ordered that the said motion for leave to file and for a rule to show cause be and the same hereby is denied, for want of jurisdiction of this Court.

For the Court:

THOMAS W. SWAN,
CHARLES E. CLARK,
JEROME N. FRANK,
United States Circuit Judges.

Dated May 3, 1943.

48 [*Clerk's certificate to foregoing transcript omitted in printing.*]

U. S. GOVERNMENT PRINTING OFFICE: 1943

No. 15, original. EX PARTE UNITED STATES. On motion for leave to file petition for writ of prohibition and/or mandamus and for a writ of certiorari. June 7, 1943. *Per Curiam:* The motion for leave to file the petition is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is granted. The order of that court of May 3, 1943, denying for want of jurisdiction—which we construe to mean want of power to consider on the merits—the Government's motion for leave to file a petition for a writ of prohibition and/or a writ of mandamus, is vacated on the authority of *Ex*

parte United States, 287 U. S. 241, 248–9, *Ex parte Peru*, 318 U. S. 578, and *Roche* v. *Evaporated Milk Assn.*, *ante*, p. 21. The cause is remanded to the Circuit Court of Appeals for further proceedings not inconsistent with this opinion. Other relief sought by the Government in its application to this Court is denied, without prejudice to an application to the Circuit Court of Appeals. *Solicitor General Fahy* and *Assistant Attorney General Shea* for the United States.